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August 11, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

On behalf of the Smart Buildings Policy Project, Philip Verveer, Robert Millar, and the undersigned met yesterday afternoon with Christopher Wright, David Horowitz, and Joel Kaufman of the FCC's Office of General Counsel to discuss the legal issues concerning the provision of nondiscriminatory telecommunications carrier access to multi-tenant buildings.

We discussed the practical problems of telecommunications carriers obtaining access to consumers in multi-tenant buildings and explained the efforts being taken by States such as Texas to remedy this problem. We briefly discussed the constitutional issues presented by nondiscriminatory access requirements and appropriate methods of ensuring just compensation in the event that a taking is effected by the Commission's rules. We explained that the D.C. Circuit's *Bell Atlantic v. FCC*[1] decision does not apply to the actions considered in the above-referenced dockets and, in that regard, submitted to the participants a copy of *Transmission Access Policy Study Group v. Federal Energy Regulatory Comm'n*,[2] a copy of which is enclosed herein. In addition, we discussed the ways in which the FCC could accomplish nondiscriminatory access through requirements imposed on carriers directly.

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1 24 F.3d 1441 (D.C. Cir. 1994).

2 Nos. 97-1715 et. al, 2000 WL 762706 (D.C. Cir., June 30, 2000). Incidentally, FERC adopted rules allowing utilities to receive compensation for stranded costs resulting from its open access requirements. These compensation mechanisms were adopted without a statutory formula and pursuant to the agency's authority under sections 205 and 206 of the Federal Power Act to remedy unduly discriminatory or preferential rules, regulations, practices, or contracts affecting public utility rates for transmission in interstate commerce.

Because these topics concern a pending rulemaking at the Commission, in accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Building Policy Project's ex parte presentation, along with a copy of the proposed nondiscriminatory access rules currently under consideration by the Texas Public Utilities Commission.

Respectfully submitted,

Gunnar D. Halley
Counsel for the
SMART BUILDINGS POLICY PROJECT

Enclosures

cc: Christopher Wright
David Horowitz
Joel Kaufman

PROPOSED TX PUC Regulations
(Final order pending)

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICE
16 TAC §26.129

The Public Utility Commission of Texas (commission) proposes new §26.129 relating to Standards for Access to Provide Telecommunications Services at Tenant Request. The purpose of this proposed rule is to implement the Public Utility Regulatory Act, Texas Utilities Code Annotated §§54.259, 54.260, and 54.261 (Vernon 1998 & Supplement 2000) (PURA), regarding the non-discriminatory treatment of telecommunications utilities by property owners. Project Number 21400 has been assigned to this proceeding.

The proposed rule sets forth procedures whereby a requesting telecommunications carrier may seek access to the lease owner's property to install telecommunications equipment upon a tenant's request. The rule encourages independent negotiations between the telecommunications carrier and the property owner, and establishes procedures for resolution by the commission in the event an agreement cannot be reached. Further, the proposed rule addresses situations in which the property owner may deny access to the building for safety concerns or space constraints.

In 1995, the Legislature enacted PURA §§54.259, 54.260, and 54.261 as part of a comprehensive package of legislation to open Texas' telecommunications market to competition. The thrust of these particular PURA sections is to promote competition in the telecommunications market by allowing a tenant under a real estate lease to choose the provider of its telecommunications services. As the competitive marketplace has developed, the need for specific rules to implement these sections has become evident. Accordingly, the commission initiated this rulemaking proceeding to ensure the access of a telecommunications utility to the owner's property to serve a tenant as requested, thereby promoting tenant choice

As part of the drafting process, commission staff conducted workshops in Austin, Houston, and Dallas to receive input from potentially affected persons. Further, staff participated in building tours to promote an understanding of the technical aspects of and potential space constraints due to the installation of telecommunications equipment.

The commission has prepared a takings impact assessment pursuant to Texas Government Code Annotated §2007.043. Interested persons may obtain a copy of this assessment by contacting the commission's Central Records department and referencing Project Number 21400. In summary, the commission finds that adherence to PURA §54.259 and proposed §26.129 may result in takings of real property. The purpose of the statute and proposed rule is to promote competition in the telecommunications market by effectuating a tenant's choice of telecommunications services provider. This purpose is advanced by ensuring the reasonable access of the telecommunications services provider to the owner's property to provide service to a tenant that has chosen such company as its telecommunications provider. Although PURA §54.259 and the proposed rule impose a burden on private real property, any taking that might result will be compensated. PURA §54.260 and the proposed rule require a telecommunications services provider to pay reasonable compensation to the affected property owner for the use of such space on the property.

The commission finds that the citizens of Texas will benefit from the proposed rule because it will foster competition in the tenant sector of the telecommunications services market. The language of PURA specifically sets forth the interrelationship between the property owner and the telecommunications services provider chosen by the tenant and authorizes the provider's access to the property as the means for accomplishing a tenant's choice in a telecommunications services provider. PURA further grants the commission plenary jurisdiction to enforce the statute's requirements. See PURA §54.259(c) and§54.260(b).

Evan Farrington, Attorney, Office of Policy Development, has determined that for the first five-year period the proposed rule isin effect there are no foreseeable implications relating to cost or revenues of the state or local governments as a result often forcing or administering the section.

Mr. Farrington has also determined that for each year of the first five years the proposed rule is in effect the public benefits expected as a result of enforcing the rule will be that customers will have increased choice of telecommunications providers. Furthermore, there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the proposed section. There may be economic costs to persons who are required to comply with the proposed section. These costs are likely to vary from business to business, and are difficult to ascertain. However, the benefits accruing from implementation of the proposed section will outweigh these costs.

Moreover, Mr. Farrington has determined that the proposed rule will not affect a local economy for each year of the first five years it is in effect. Therefore, a local employment impact statement is not required under Administrative Procedure Act, Texas Government Code Annotated §2001.022.

The commission seeks comments on the proposed rule from interested persons. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to adopt the proposed rule. Additionally, the commission invites specific comments from interested persons on the proposal of using six months as the measure of time remaining on a lease for purposes of defining the term"tenant" in the definitions section of the proposed rule. The commission also seeks comment regarding any applicable Texas Supreme Court case law that delineates the standards necessary to determine whether compensation is adequate pursuant to the requirement in PURA §54.260(a)(6). The commission invites comment on whether the proposed rule provides property owners with adequate measures to address the security, safety, liability and other concerns specified in PURA §54.260(a)(1)-(5). Lastly, the commission seeks comment on whether it should adopt a section that allows parties to opt into alternative dispute resolution. If so, what procedures should the commission adopt for referral to mediation or arbitration?

Comments on the proposed rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701North Congress Avenue, P.O. Box 13326, Austin, Texas, 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. All comments should refer to Project Number 21400.

The commission staff will conduct a public hearing on this rulemaking pursuant to Texas Government Code §2001.029 on **Tuesday, June 13, 2000 at 9:30 a.m. in the Commissioners' Hearing Room** at the commission's offices, 1701 North Congress Avenue, Austin, Texas, 7th floor.

This new section is proposed pursuant to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated (Vernon1998 & Supplement 2000) §14.002, which provides the commission with authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also proposes this rule pursuant to PURA §54.259,which provides it with authority to enforce the prohibition on discrimination by property owners; PURA §54.260, which provides it with authority to enforce conditions imposed by property owners; and PURA §54.261 regarding shared tenant services contracts.

Cross Reference to Statutes: PURA §§14.002, 54.259, 54.260, and 54.261.

§26.129. Standards for Access to Provide Telecommunications Services at Tenant Request.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §§54.259, 54.260, and 54.261regarding the non-discriminatory treatment of a telecommunications utility by the property owner upon a tenant's request for telecommunications services.

(b) Application.

(1) This section applies to the following entities:

(A) "Telecommunications utilities" or "telecommunications utility" as defined in PURA §51.002(11) that hold a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and hold a certificate if required by the Public Utility Regulatory Act ;

(B) Public or private property owners of commercial property and the property owner's authorized representative(s); and

(C) Public or private property owners of commercially operated residential property with four or more dwelling units and the property owner's authorized representative(s).

(2) This section does not apply to institutions of higher education as set forth by PURA §54.259(b).

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Conduit - A pipe installed on the property, in a building between floors, attached to walls, between buildings, located in the ceiling or floor space of a building, located on a customer's premise, or from a public right of way into a building or buildings for the purposes of containing and protecting cable.

(2) Existing carrier - A telecommunications utility that has installed telecommunications equipment on the property and is providing telecommunications services to a tenant on the property through the use of its own installed telecommunications equipment at the time the requesting carrier seeks access to the property.

(3) Property - A building or buildings that are under common ownership and which are located on a single piece of land, or a campus, or a parcel of land.

(4) Property owner - The owner of the property or its authorized representative(s).

(5) Requesting carrier - A telecommunications utility, that is not the existing carrier, seeking access to space in or on one or more buildings on the property for the purpose of providing telecommunications services to one or more tenants who have requested such services.

(6) Space - Area of the property for which access is being requested by the requesting carrier, which will be used to install the telecommunications equipment needed to provide telecommunications services to a requesting tenant on the property. Space includes conduit and may be located in or on the rooftop of a building or buildings on the property.

(7) Telecommunications equipment - The equipment installed or used by the existing carrier or the requesting carrier to provide telecommunications services to a tenant who has requested telecommunications services from the existing carrier or there questing carrier.

(8) Tenant - Any occupant of a building or buildings on the property under the terms of a lease with the property owner which hasa remaining term of more than six months and who is not subject to filed bona fide eviction proceedings under such lease with the property owner, or an authorized subtenant of such occupant whose

occupancy is subject to the terms of the primary lease which has a remaining term of more than six months.

(d) Rights of parties.

(1) Tenant's right to choose requesting carrier. A tenant is entitled to choose the provider of its telecommunications services.

(2) Property owner's rights to manage access. The requirements of this subsection are not intended to eliminate or restrict the property owner's rights to manage access to public or private property pursuant to PURA §§54.259, 54.260, and 54.261.

(A) A property owner may:

(i) impose a condition on the requesting carrier that is reasonably necessary to protect:
(I) the safety, security, appearance, and condition of the property; and

(II) the safety and convenience of other persons;

(ii) impose a reasonable limitation on the time at which the requesting carrier may have access to the property to install telecommunications equipment;

(iii) impose a reasonable limitation on the number of such requesting carriers that have access to the property, if the property owner can demonstrate a space constraint that requires the limitation;

(iv) require a requesting carrier to agree to indemnify the property owner for damage caused installing, operating, or removing telecommunications equipment;

(v) require a tenant or requesting carrier to bear the entire cost of installing, operating, or removing telecommunications equipment; and

(vi) require requesting carrier to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(B) A property owner may not:

(i) prevent the requesting carrier from installing telecommunications equipment on the property upon a tenant request;

(ii) interfere with the requesting carrier's installation of telecommunications equipment on the property upon a tenant request;

(iii) discriminate against such requesting carrier regarding installation, terms, or compensation of telecommunications equipment to a tenant on the property;

(iv) demand or accept an unreasonable payment of any kind from a tenant or the requesting carrier for allowing the requesting carrier on or in the property; or

(v) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, based on the identity of a telecommunications utility from which a tenant receives telecommunications services.

(3) Requesting carrier's right to access.

(A) Upon a tenant request, the requesting carrier has the right to install telecommunications equipment on the property:

(i) for a period no longer than the remaining term of the requesting tenant's lease unless otherwise agreed to by the requesting carrier and the property owner;

(ii) without interference from the property owner, except as provided in this subsection; and

(iii) at terms, conditions, and compensation rates which are non-discriminatory.

(B) The requesting carrier shall comply with all applicable federal, state, and local codes and standards, e.g., fire codes, electrical codes, safety codes, building codes, elevator codes.

(4) Restriction on exclusive agreement. A telecommunications utility shall not enter into an agreement, contract, pact, understanding or other like arrangement with the property owner to be the sole or exclusive provider of telecommunications services to a specific or defined group of actual or prospective tenants on the property.
(e) Procedures upon tenant request.

(1) Tour of property.

(A) Upon receiving a request for telecommunications services from a tenant, but prior to or concurrently with providing the property owner with notice of intent to install telecommunications equipment as described in paragraph (3) of this subsection, the requesting carrier may request, in writing, a tour of the property to determine an appropriate location for the telecommunications equipment needed to provide the telecommunications services requested by such tenant. This request shall identify the requesting tenant and be sent by certified mail, return receipt requested.

(B) The property owner shall provide such property tour within ten calendar days of receipt of the requesting carrier's written request.

(2) Request for technical drawings.

(A) In its written request for a tour of the property, the requesting carrier may request that the property owner provide computer aided design (CAD) drawings or similarly detailed drawings of the mechanical room(s), risers and other common spaces, if available, in order to assist the requesting carrier in developing plans and specifications for placement of telecommunications equipment.

(B) Such drawings should be provided to the requesting carrier, at the requesting carrier's expense, within ten calendar days of the property owner's receipt of the requesting carrier's written request.

(3) Notice of intent to install telecommunications equipment.

(A) Upon receiving a request for telecommunications services from a tenant, the requesting carrier shall notify the property owner not fewer than 30 calendar days before the proposed date on which installation of telecommunications equipment needed to provide the telecommunications services requested by a tenant is to commence.

(B) Such notice shall be sent by certified mail, return receipt requested, to the property's on-site manager and to the person identified in the tenant's lease to receive notices. The requesting carrier shall also provide a copy of the notice of intent to any person designated by the property's on-site manager as the proper party to receive such notice.

(C) The requesting carrier shall include, but is not limited to, the following in its notice of intent:

(i) the identity of the requesting tenant;

(ii) the property address and building number (if applicable);

(iii) the proposed timeline for the installation of telecommunications equipment;

(iv) the type of telecommunications equipment to be installed;

(v) the proposed location, space requirements, proposed engineering drawings, and other specifications of the telecommunications equipment;

(vi) the conduit requirements, if any; and

(vii) a copy of PURA §§54.259, 54.260, and 54.261 and this section (Substantive Rule §26.129).

(f) Requirement to negotiate for 45 days.

(1) Upon receipt of the requesting carrier's notice of intent to install telecommunications equipment, the property owner and the requesting carrier shall attempt to reach a mutually acceptable agreement regarding the installation of the requesting carrier's telecommunications equipment and reasonable compensation due the property owner as a result of such installation.

(2) If such an agreement is not reached within 45 calendar days of the property owner's receipt of the requesting carrier's notice of intent, either party may file for resolution with the commission pursuant to subsection (i) of this section.

(3) The requesting carrier and the property owner may agree, in writing, to extend the period of negotiation prescribed by this subsection.

(g) Parameters for installation of telecommunications equipment. The property owner shall not deny the requesting carrier access to space, except due to inadequate space or safety concerns.

(1) Inadequate space.

(A) Property owner's denial due to inadequate space. The property owner may deny access to space if it does so within ten calendar days of its receipt of the requesting carrier's notice of intent to install telecommunications equipment, where the space and/or conduit required for installation is not sufficient to accommodate the requesting carrier's request.

(B) Demonstration of inadequate space.

(i) In the event the property owner denies access to space, the property owner shall demonstrate that there is insufficient space and/or conduit to accommodate the requesting carrier's request for space. The property owner shall allow the requesting carrier to inspect the space and/or conduit to which it is denied access; or it may utilize any other method of proof mutually agreed upon by the property owner and the requesting carrier.

(ii) Such demonstration shall be completed within ten calendar days of the requesting carrier's receipt of the property owner's denial.

(iii) Following such demonstration or other agreed upon method of proof, the requesting carrier shall have ten calendar days to dispute the property owner's assertion that a space limitation exists by pursuing commission resolution pursuant to subsection (i)
of this section.

(C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(2) Safety concerns.

(A) Property owner's denial due to safety concern. The property owner may deny access to space if it does so within ten calendar days of its receipt of the requesting carrier's notice of intent to install telecommunications equipment, where the installation of the requesting carrier's telecommunications equipment would cause an unreasonable circumstance that would compromise the safety of the property and/or persons on the property.

(B) Demonstration of safety concern.

(i) In the event the property owner denies access to space, the property owner shall demonstrate that an unreasonable safety hazard that requires the denial of access to space exists. The property owner shall specify the alleged safety hazard and cite any applicable codes and/or standards. The property owner shall allow the requesting carrier to inspect the space and/or conduit to which it is denied access, or it may utilize any other method of proof mutually agreed upon by the property owner and the requesting carrier.
(ii) Such demonstration shall be completed within ten calendar days of the requesting carrier's receipt of the property owner's denial.

(iii) Following such demonstration or other agreed upon method of proof, the requesting carrier shall have ten calendar days to dispute the property owner's assertion that a safety hazard exists by pursuing commission resolution pursuant to subsection (i)of this section.

(C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(h) Parameters for determining reasonable compensation for access.

(1) The property owner and the requesting carrier shall attempt to reach a mutually acceptable agreement regarding reasonable and non-discriminatory compensation due the property owner as a result of the requesting carrier's installation of telecommunications equipment required to provide telecommunications services to a requesting tenant.

(2) The property owner shall not impose a fee on the requesting carrier unrelated to the requesting carrier's usage of space and/or provision of telecommunications services to a requesting tenant, except as provided by agreement of the property owner and the requesting carrier.

(3) The property owner and the requesting carrier shall negotiate terms and conditions concerning the removal of the requesting carrier's telecommunications equipment upon the departure of a tenant served by such requesting

carrier or the end of the service agreement between a tenant and the requesting carrier.

(4) The property owner may require a security deposit not to exceed an amount equal to one month of fees or rents as determined by the agreement between the requesting carrier and the property owner.

(i) Failure to reach negotiated agreement.

(1) Alternative Dispute Resolution. As an alternative to petitioning the commission for resolution of a dispute, parties may voluntarily submit any controversy or claim under this subsection to settlement by alternative dispute resolution. This alternative dispute resolution shall be conducted under the alternative dispute resolution procedures of Chapter 2009, Administrative Procedure Act, and Chapter 154, Civil Practice and Remedies Code.

(2) Petition to commission for resolution of dispute. If a mutually acceptable agreement regarding the installation of the requesting carrier's telecommunications equipment, the reasonable compensation due the property owner as a result of such installation, or other disputed issues is not reached within 45 calendar days of the property owner's receipt of the requesting carrier's notice of intent to install telecommunications equipment, either the property owner or the requesting carrier may petition the commission for resolution. The petition shall include proof of the requesting carrier's proper service of notice of intent to the property owner in the form of an affidavit and attached copy of return receipt.

(3) Types of disputes and information required for each.

(A) Installation dispute.

(i) The property owner may deny access consistent with subsection (g) of this section.

(ii) The property owner and the requesting carrier shall each provide the commission with information specifying the space or safety related installation dispute(s) that is preventing a negotiated agreement.

(iii) The property owner and the requesting carrier shall each provide the commission with information supporting its position in the dispute(s).
(B) Reasonable compensation dispute.

(i) The property owner shall provide the commission with the amount of compensation being sought and the basis for such claim, including information supporting the factors listed in clause (iii) of this subparagraph.

(ii) The requesting carrier shall provide the commission with information supporting the amount of compensation it deems reasonable to compensate the property owner for installation of its telecommunications equipment.

(iii) In determining a reasonable amount of compensation due the property owner for installation of the requesting carrier's telecommunications equipment, the commission may consider, but is not limited to, the following:

(I) the location and amount of space occupied by installation of the requesting carrier's telecommunications equipment;

(II) evidence that the property owner has a specific alternative use for any space which would be occupied by the requesting carrier's telecommunications equipment and which would result in a specific quantifiable loss to the property owner;

(III) the value of the property before and after the installation of the requesting carrier's telecommunications equipment and the methods used to determine such values;

(IV) possible interference of the requesting carrier's telecommunications equipment with the use and occupancy of the property which would cause a decrease in the rental or resale value of the property;

(V) actual costs incurred by the property owner directly related to installation of the requesting carrier's telecommunications equipment;

(VI) the market rate for similar space used for installation of telecommunications equipment in a similar property; and

(VII) the market rate for tenant leaseable space in the property or a similar property.

(C) Other disputed issues.

(i) The property owner and the requesting carrier shall each provide the commission with information specifying any other dispute(s) preventing a negotiated agreement.

(ii) The property owner and the requesting carrier shall each provide the commission with information supporting its position regarding these other dispute(s).

(4) Procedure.

(A) Upon the proper filing of a petition, as set forth in paragraph (1) of this subsection, the commission may proceed to resolution of a dispute pursuant to the commission's procedural rules as set forth in Chapter 22 of this title (relating to Practice and Procedure).

(B) In addition to the requirements set forth in paragraph (1) of this subsection, all petitions shall comply with the requirements of Chapter 22, Subchapter D of this title (relating to Notice) and Chapter 22, Subchapter E of this title (relating to Pleadings and Other Documents).

(C) The commission may grant interim relief, subject to true-up, so as not to impair or delay, the right of the requesting carrier to install, maintain, and remove its telecommunications equipment, or to provide telecommunications services to a requesting tenant, during the pendency of the proceeding.

(j) Administrative penalties. The provisions set forth in §22.246 of this title (relating to Administrative Penalties) shall apply to any violation of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on April 13, 2000.

TRD-200002642
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 28, 2000
For further information, please call: (512) 936-7308

Only the Westlaw citation is currently available.

United States Court of Appeals,
District of Columbia Circuit.

TRANSMISSION ACCESS POLICY STUDY GROUP, et al. Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.
Vermont Department of Public Service, et al., Intervenors

Nos. 97-1715, 98-1111-98-1115, 98-1118-98-1120, 98-1122, 98-1124-98-1129, 98-1131, 98-1132, 98-1134, 98-1136, 98-1137, 98-1139-98-1143, 98-1145, 98-1147-98-1150, 98-1152-98-1156, 98-1159, 98-1162, 98-1163, 98-1166, 98-1168-98-1176, 98-1178 and 98-1180.

Argued Nov. 3, 1999.
Decided June 30, 2000.

On Petitions for Review of Orders of the Federal Energy Regulatory Commission.

Sherilyn Peterson, John T. Miller, Jr., Robert C. McDiarmid, Stanley C. Fickle, Sara D. Schotland, Jeffrey L. Landsman, Lawrence G. Malone, Jeffery D. Watkiss, Richard M. Lorenzo, Isaac D. Benkin, Wallace E. Brand, Daniel I. Davidson, Cynthia S. Bogorad, Harvey L. Reiter and Randolph Lee Elliott argued the causes for petitioners. With them on the briefs were William R. Maurer, Ben Finkelstein, David E. Pomper, Ronald N. Carroll, John Michael Adragna, Sean T. Beeny, Wallace F. Tillman, Susan N. Kelly, Craig W. Silverstein, A. Hewitt Rose, Bryan G. Tabler, James D. Pembroke, David C. Vladeck, Robert F. Shapiro, Lynn N. Hargis, Wallace L. Duncan, Richmond F. Allan, Alan H. Richardson, Michael A. Mullett, C. Kirby Mullen, Robert A. Jablon, Sara C. Weinberg, John F. Wickes, Jr., Todd A. Richardson, Brian A. Statz, John P. Cook, Charles F. Wheatley, Jr., Christine C. Ryan, Robert S. Tongren, Joseph P. Serio, Barry E. Cohen, Carrol S. Verosky, Jennifer S. McGinnity, Jonathan D. Feinberg, Charles D. Gray, Robert Vandiver, Cynthia Miller, Helene S. Wallenstein, William H. Chambliss, C. Meade Browder, Jr., Mary W. Cochran, Paul R. Hightower, Brad M. Purdy, Gisele L. Rankin, Robert D. Cedarbaum, Edward H. Comer, Edward Berlin, Robert V. Zener, Elizabeth W. Whittle, James H. McGrew, Donald K. Dankner, Frederick J. Killion, Joseph L. Lakshmanan, Stephen C. Palmer, Michael E. Ward, Steven J. Ross, Marvin T. Griff and Thomas C. Trauger. Leja D. Courter, Robert E. Glennon, Jr., Neil Butterklee, Zachary D. Wilson, Sheila S. Hollis, Janice L. Lower and James B. Ramsay entered appearances.

John H. Conway, Deputy Solicitor, Federal Energy Regulatory Commission, and Timm L. Abendroth and Larry D. Gasteiger, Attorneys, argued the causes for respondent. With them on the brief was Jay L. Witkin, Solicitor. Susan J. Court, Special Counsel, and Edward S. Geldermann, Attorney, entered appearances.

Edward Berlin argued the cause for intervenors. With him on the briefs were J. Phillip Jordan, Robert V. Zener, Edward H. Comer, William M. Lange, Deborah A. Moss, James H. McGrew, Steven J. Ross, Elizabeth W. Whittle, Richard M. Lorenzo, David M. Stahl, D. Cameron Findlay, Peter Thornton, J. Phillip Jordan, Robert V. Zener, Robert C. McDiarmid, Cynthia S. Bogorad, Ben Finkelstein, Peter J. Hopkins, Margaret A. McGoldrick, Jeffery D. Watkiss, Ronald N. Carroll, Sara D. Schotland, Alan H. Richardson, Wallace L. Duncan, Richmond F. Allan, A. Hewitt Rose, Wallace F. Tillman, Susan N. Kelly, John M. Adragna, Sean T. Beeny and Randolph Lee Elliott. Edward J. Twomey, Richard P. Bonnifield, Frederick H. Ritts, David L. Huard, Dan H. McCrary, Mark A. Crosswhite, John N. Estes, III, Kevin J. McIntyre, John S. Moot, Clark E. Downs, Martin V. Kirkwood, Robert S. Waters, John T. Stough, Jr., Bruce L. Richardson, Floyd L. Norton, IV, William S. Scherman, Douglas F. John, Gary D. Bachman, Nicholas W. Fels, Robert Weinberg, Robert A. Jablon, Peter G. Esposito, Christine C. Ryan, Sheila S. Hollis, Stephen L. Teichler, James K. Mitchell, Gordon J. Smith, Edward J. Brady, Kevin F. Duffy, Michael P. May, Barbara S. Brenner, Michael J. Rustum, Sandra E. Rizzo, Kirk H. Betts, Pierre F. de Ravel d'Esclapon, Glen L. Ortman and William D. DeGrandis entered appearances.

Before: SENTELLE, RANDOLPH and TATEL, Circuit Judges.

Opinion for the Court filed PER CURIAM [FN1]:

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PER CURIAM:

*3 Following two notices of proposed rulemaking, the Federal Energy Regulatory Commission issued Orders 888 and 889 on April 24, 1996. [FN2] Reflecting the Commission's effort to end discriminatory and anticompetitive practices in the national electricity market and to ensure that electricity customers pay the lowest prices possible, these orders represent, as the Commission described in a later order not before us, "the foundation necessary to develop competitive bulk power markets...." Regional Transmission Organizations, Order No.2000, 65 Fed.Reg. 810, 812 (2000).

Open access is the essence of Orders 888 and 889. Under these orders, utilities must now provide access to their transmission lines to anyone purchasing or selling electricity in the interstate market on the same terms and conditions as they use their own lines. By requiring utilities to transmit competitors' electricity, open access transmission is expected to increase competition from alternative power suppliers, giving consumers the benefit of a competitive market. Most fundamentally, FERC's open access policies, combined with parallel action now occurring on the state level, are intended to create a market in which customers may purchase power from any of a number of suppliers. A municipality or factory in Florida, for example, will no longer have to purchase power from its local utility but instead may seek cheaper power anywhere in the country. A customer in Vermont may purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma.

*4 All key players in the electricity market have challenged various provisions of Orders 888 and 889. Their claims range from the hypertechnical to arguments that FERC lacks authority to order open access transmission at all. Finding few defects in the orders, we uphold them in nearly all respects.

I. INTRODUCTION

Historically, vertically integrated utilities owned generation, transmission, and distribution facilities. They sold generation, transmission, and distribution services as part of a "bundled" package. Due to technological limitations on the distance over which electricity could be transmitted, each utility served only customers in a limited geographic area. And because of their natural monopoly characteristics, utilities have been heavily regulated at both the federal and state levels.

Since enactment of the Federal Power Act in 1935, the electricity industry has undergone significant change, both economically and technologically. Economies of scale have justified the construction of large (greater than 500 MW) generation facilities, such as nuclear power plants. Technological advances in the 1970s and 1980s have permitted small plants to operate efficiently as well. See Notice of Proposed Rulemaking, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Stats. & Regs.¶ 32,514 at 33,059-60, 60 Fed.Reg. 17,662 (1995) ("Open Access NOPR"). Technological improvements also made feasible the transmission of electric power over long distances at high voltages. See id. ¶ 32,514 at 33,060. Alternative power suppliers, such as cogenerators, small power producers, and independent power producers emerged in response to these developments. Constructing and operating generation capacity at prices lower than the embedded generation costs of traditional utilities, these alternative suppliers have created a wholesale market for low-cost power.

The growth of this new wholesale market faced a serious obstacle. "As entry into wholesale power generation markets increased," FERC explained, "the ability of customers to gain access to the transmission services necessary to reach competing suppliers became increasingly important." Id. at33,062. Yet the owners of transmission lines, the traditional utilities that had built the high-cost generation capacity, denied alternative producers access to their transmission lines on competitive terms and conditions. FERC therefore began requiring utilities to file open access transmission tariffs that permitted other suppliers to transmit power over their lines under certain circumstances, such as when a utility sought authorization to merge with another utility or to sell power at market-based rather than cost-based rates.

*5 Then, in 1992, Congress enacted the Energy Policy Act, which amended sections 211 and 212 of the FPA to authorize FERC to order utilities to "wheel" power--i.e., transmit power for wholesale sellers of power over the utilities' transmission lines--on a case-by-case basis. Pub.L. No. 102-486, 106 Stat. 2776, 2915-16 (1992) (codified at 16 U.S.C. §§ 824j-k). FERC "aggressively implemented" amended sections 211 and 212 to " 'facilitate the development of competitively priced generation supply options, and to ensure that wholesale purchasers of electric energy can reach alternative power suppliers and vice versa.' " Open Access NOPR, ¶ 32,514 at 33,064 (quoting Notice of Proposed Rulemaking, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Stats. & Regs. ¶ 32,507 at 32,866, 59 Fed.Reg. 35,274 (1994) ("Stranded Cost

NOPR")).

Despite these efforts, a persistent barrier to the development of a competitive wholesale power sale market remained. The Commission found that "utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices." Open Access NOPR, ¶ 32,514 at 33,052. Power generators not permitted to use utilities' transmission lines on reasonable terms have no way to transmit their power to customers.

Invoking its authority under sections 205 and 206 of the FPA to remedy unduly discriminatory or preferential rules, regulations, practices, or contracts affecting public utility rates for transmission in interstate commerce, 16 U.S.C. §§ 824d-e, and building on its experience in restructuring the natural gas industry, see Associated Gas Distribs. v. FERC, 824 F.2d 981 (D.C.Cir.1987), the Commission issued Orders 888 and 889 to "prevent this discrimination by requiring all public utilities owning and/or controlling transmission facilities to offer non-discriminatory open access transmission service." Open Access NOPR, ¶ 32,514 at 33,052. Orders 888 and 889 mandate what FERC terms "functional unbundling," i.e., separating utilities' wholesale transmission functions from their wholesale electricity merchant functions. Specifically, the orders require utilities to (1) file open access nondiscriminatory tariffs that contain the minimum terms and conditions of nondiscriminatory services prescribed by FERC through its pro forma tariff; (2) take transmission service for their own new wholesale sales and purchases of electric energy under the same terms and conditions as they offer that service to others; (3) develop and maintain a same-time information system that will give potential and existing transmission users the same access to transmission information that the utility enjoys (called the "Open Access Same-Time Information System" or "OASIS"); and (4) state separate rates for wholesale generation, transmission, and ancillary services. See Order 888, ¶ 31,036 at 31,635-36.

In requiring utilities to provide open access transmission, FERC acknowledged the dramatic change the orders would bring about, explaining that "[t]he most critical transition issue that arises as a result of the Commission's actions in this rulemaking is how to deal with the uneconomic sunk costs that utilities prudently incurred under an industry regime that rested on a regulatory framework and a set of expectations that are being fundamentally altered." Order 888-A, ¶ 31,048 at 30,346. Known as "stranded costs," these "uneconomic sunk costs" are costs that utilities incurred not only with regulatory approval, but with the expectation of continuing to serve their current customers. These costs will become "stranded" when customers take advantage of open access transmission to purchase cheaper power from suppliers other than their historic utilities. Order 888 affords utilities an opportunity to recover stranded costs from their wholesale requirements customers, but only from those customers who use their utility's transmission service to purchase power from new suppliers, and only if the utility can prove that it had a reasonable expectation of continued service to that customer.

***6** After three rehearing orders, the Commission denied any further rehearing. All petitions for review of Orders 888 and 889 were consolidated and transferred to this circuit. We consider these petitions in this opinion. Section II considers challenges to FERC's authority to require utilities to file open access tariffs as a remedy for undue discrimination. Section III evaluates FERC's conclusion that it lacked jurisdiction to order retail unbundling yet has jurisdiction over transmission where state commissions have unbundled retail sales. Section IV addresses FERC's authority to require nonpublic utilities to provide reciprocal open access transmission service. Section V considers challenges to Order 888's stranded cost recovery provisions. Section VI evaluates petitioners' arguments relating to credits for customer-owned facilities and behind-the-meter generation. Section VII addresses discounting, interface allocation, and liability. Section VIII evaluates other arguments relating to the terms and conditions of the pro forma tariff. Section IX assesses FERC's compliance with the National Environmental Policy Act and the Regulatory Flexibility Act.

In the end, we affirm the orders in all respects except two: we remand for FERC to explain its treatment of energy costs in the stranded cost market option (Section V.A.5.c) and to provide a reasonable cap on contract extensions under existing customers' right-of-first-refusal (Section VIII.E).

II. FERC'S AUTHORITY TO REQUIRE OPEN ACCESS

Although FERC asserts that "mounting claims of undue discrimination in transmission access" prompted its movement toward open access, the open access requirement of Order 888 is premised not on individualized findings of discrimination by specific transmission providers, but on FERC's identification of a fundamental systemic problem in the industry. Generally, those entities that own or control interstate transmission facilities are vertically-integrated public utilities that also generate and sell electricity. In its 1995 notice of proposed rulemaking, FERC observed that there were at that time approximately 328 public utilities, marketers, and wholesale generation entities with transmission needs, and that approximately 137 of those owned or controlled the transmission facilities. See Open Access NOPR, ¶ 32,514 at 33,051. Entry into the transmission market is difficult and restricted, so those utilities that already own transmission facilities enjoy a natural monopoly over that field. The transmission-owning utilities can use their position to favor their own generated electricity and to exclude competitors from the market, whether by denying transmission access outright, or by providing transmission services to competitors only at comparatively unfavorable rates, terms, and conditions. Utilities that own or control transmission facilities naturally wish to maximize profit. The transmission- owning utilities thus can be expected to act in their own interest to maintain their monopoly and to use that position to retain or expand the market share for their own generated electricity, even if they do so at the expense of lower-cost generation companies and consumers.

Even before Order 888, some transmission-owning utilities voluntarily opened their transmission facilities to third party suppliers and purchasers of electricity; and FPA § 211 explicitly gives FERC the authority to order involuntary wheeling on a case-by-case basis. The Commission decided, however, that relying upon voluntary arrangements and § 211 orders would not remedy the fundamentally anti-competitive structure of the transmission industry. Instead, the Commission concluded, such a piecemeal approach would result in an inefficient "patchwork" of transmission systems nationwide. "The ultimate loser in such a regime is the consumer." Open Access NOPR, ¶ 32,514 at 33,071.

*7 As an alternative, the Commission interpreted the antidiscrimination language of FPA §§ 205 and 206, 16 U.S.C. §§ 824d, 824e (1994), as giving it the authority to impose open access as a generic remedy for its findings of systemic anticompetitive behavior. Invoking that broad authority, in Order 888, FERC requires every transmission-owning public utility within FERC's jurisdiction to file an Open Access Transmission Tariff (OATT) containing minimum terms and conditions for non-discriminatory service and to take transmission service for their own wholesale sales and purchases of electric energy under those filed OATTs. In other words, this order requires the public utilities to provide the same transmission services to anyone purchasing or selling wholesale power--other public utilities, federal power suppliers and marketers, municipalities, cooperatives, independent power producers, qualifying facilities, or power marketers--as they provide to themselves. The Board of Water, Light and Sinking Fund Commissioners of the City of Dalton (Dalton) operates a municipally-owned utility system which provides electric power to residential, commercial, and industrial consumers in the city of Dalton, Georgia. Dalton obtains transmission services from the Georgia Integrated Transmission System (ITS), which it owns along with public utility Georgia Power Company (GPC) and two other utilities that are not subject to FERC's jurisdiction, and which GPC operates according to the terms of various filed agreements. Puget Sound Energy, Inc. (Puget) is a public utility in the Pacific Northwest, where Bonneville Power Administration, which is not a public utility subject to Order 888's requirements, [FN3] dominates the electricity transmission market. These two industry petitioners challenge the open access requirement of Order 888 on various statutory, constitutional, and other grounds.

Turning first to the FPA itself, Puget and Dalton argue that §§ 205 and 206 do not give the Commission the authority to order open access as a generic remedy; and even if the FPA does give the agency such authority, FERC has failed to satisfy the statutory requirements for invoking it. Dalton also argues that Order 888 itself violates the FPA by discriminating against transmission facility owners who have invested in those assets. Shifting to constitutional concerns, Puget and Dalton, along with amicus curiae Pacific Legal Foundation, maintain that Order 888 violates the Takings Clause of the Fifth Amendment. Finally, Dalton argues that the open access requirements of the OATT interfere with the antitrust conditions of outstanding nuclear licenses, and thus are unlawful. While we consider each of these challenges separately, [FN4] we hold that Order 888's open access requirement is authorized by and consistent with the FPA and the Takings Clause. We conclude also that Dalton has not yet suffered injury from the alleged conflict between open access and the nuclear license antitrust conditions, and that its complaint on that issue is therefore not yet ripe for judicial review.

A. Statutory Challenges: FPA §§ 205 and 206

***8 Section 205 of the FPA broadly precludes public utilities, in any transmission or sale subject to FERC's jurisdiction, from "mak[ing] or grant [ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage...." 16 U.S.C. § 824d(b). Section 206 of the FPA further provides in relevant part that**

[w]henever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

16 U.S.C. § 824e(a). The statutory issues before us are whether these provisions give FERC the authority to order involuntary wheeling as a generic remedy, and if they do, whether FERC satisfied the procedural and evidentiary requirements imposed by these provisions.

1. §§ 205 and 206 and Otter Tail Power Company

The Commission did not write on a blank slate when it interpreted FPA §§ 205 and 206 as giving it the authority to order involuntary wheeling as a generic remedy for systemic anti-competitive behavior. Puget and Dalton argue principally that the Supreme Court's decision in Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), controls the disposition of this issue. Otter Tail was an antitrust case in which the Supreme Court addressed whether the district court could require Otter Tail Power Company to wheel power for its competitors as a remedy for monopolistic practices. Contrary to the company's arguments, the Supreme Court concluded that the district court's order did not impermissibly conflict with the authority of the Federal Power Commission, FERC's predecessor, because the agency did not have the power itself to order involuntary wheeling under Part II of the FPA, which includes §§ 205 and 206. Puget and Dalton cite various circuit court precedents, including one from this circuit, as construing Otter Tail to prevent the Commission from ordering involuntary wheeling as a generic remedy. See, e.g., Florida Power & Light Co. v. FERC, 660 F.2d 668 (5th Cir. Unit B Nov.1981); New York State Electric & Gas Corp. v. FERC, 638 F.2d 388 (2d Cir.1980); Richmond Power & Light v. FERC, 574 F.2d 610 (D.C.Cir.1978). Finally, Puget and Dalton note that subsequent to Otter Tail, Congress enacted FPA § 211, 16 U.S.C. § 824j, giving FERC the authority to impose open access on a case-by-case basis to remedy a broad range of problems. The petitioners argue that, if FPA §§ 205 and 206 authorize the Commission to impose open access, and if Otter Tail does not prohibit such action, then there was no reason for Congress to enact § 211.

In response, the Commission contends that we should not read Otter Tail as limiting its authority under FPA § 206 to remedy discriminatory behavior, since Otter Tail was an antitrust case and not an undue discrimination case. The Commission also maintains that the circuit court cases cited by the petitioners are not on point and do not prohibit a generic open access remedy. The Commission points instead to our decision in Associated Gas Distributors v. FERC, 824 F.2d 981, 998 (D.C.Cir.1987) (AGD), in which we upheld a similar open access transportation requirement imposed by FERC on natural gas transmission, as the controlling precedent. Finally, FERC argues that Congress enacted FPA § 211 to broaden its already existing authority to order involuntary wheeling, as FPA §§ 205 and 206 authorize such action only as a remedy for undue discrimination.

***9** We agree with FERC that our decision in AGD controls the disposition of this issue. In AGD, we reviewed a FERC order imposing open access conditions on pipelines transporting natural gas. See 824 F.2d at 997-1001. Considering arguments quite similar to those made by the petitioners here, we concluded that Otter Tail does not constrain FERC from mandating open access where it finds circumstances of undue discrimination to exist. See id. at 998-99. Turning to relevant circuit precedent, we construed Richmond Power & Light as supporting only the proposition that a refusal to provide transmission services to another utility was not per se unduly discriminatory and we noted that the court in Florida Power & Light expressly left open the question of whether FERC could impose open access conditions as a remedy for anti- competitive behavior. See id. at 999. Further, we pointed out that our reading of Richmond is consistent with other precedent, specifically Central Iowa Power Coop. v. FERC, 606 F.2d 1156 (D.C.Cir.1979), in which we upheld FERC's use of its authority to prevent undue discrimination to condition its approval of a power-pooling agreement upon removal of membership criteria which denied certain privileges to some but not all participants. See AGD, 824 F.2d at 999. Indeed, in AGD, we noted that open access relies upon the very same principles that we upheld in Central Iowa. See id. Although AGD addressed open access under the antidiscrimination provisions of the Natural Gas Act (NGA) rather than FPA §§ 205 and 206, we have repeatedly recognized the similarity of the two statutes and held that they should be interpreted consistently. See Environmental Action v. FERC, 996 F.2d 401, 410 (D.C.Cir.1993); Tennessee Gas Pipeline Co. v. FERC, 860 F.2d 446, 454 (D.C.Cir.1988); see also Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 n. 7, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). Thus, AGD counsels the conclusion that, while Otter Tail may represent a general rule that FERC's authority to order open access is limited, the FPA, like the NGA, makes an exception to that rule where FERC finds undue discrimination.

Moreover, as in AGD, the deferential standard of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104

S.Ct. 2778, 81 L.Ed.2d 694 (1984), governs our review of FERC's interpretation of FPA §§ 205 and 206. See AGD, 824 F.2d at 1001. If we agreed with Puget and Dalton that the Supreme Court's Otter Tail opinion dictates a particular construction of §§ 205 and 206, then the Commission's contrary interpretation would not be entitled to Chevron deference. See Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."). But having concluded that Otter Tail does not govern the disposition of this case, we are faced solely with considering the validity of FERC's interpretation of the FPA, a statute that the Commission administers. In AGD, we concluded that FERC reasonably interpreted the NGA's ambiguous antidiscrimination provisions as giving it broad authority to remedy unduly discriminatory behavior through a generic open access requirement. See AGD, 824 F.2d at 1001. Given the FPA's similar language, we can only reach the same conclusion with respect to Order 888. For all of these reasons, we find that the Commission has the authority under FPA §§ 205 and 206 to require open access as a generic remedy to prevent undue discrimination.

2. § 206(a) Procedural and Evidentiary Requirements

***10** Puget and Dalton next argue that, even if FPA §§ 205 and 206 authorize FERC to impose open access generically, § 206(a) imposes certain procedural and evidentiary requirements for action which the Commission failed in two separate but related ways to satisfy. First, the petitioners claim that FPA § 206(a) requires substantial evidence of contemporaneous "unjust, unreasonable, unduly discriminatory or preferential" behavior before the Commission can act. The Commission made no finding of discrimination or monopoly control on the part of Georgia Power Company or Puget. None of the applications or complaints filed with the Commission accused these petitioners of unduly discriminatory or anti-competitive behavior. Instead, the Commission premised Order 888 on a generic finding that public utility holders as a group have sufficient monopoly power over the transmission of electricity to engage in unduly discriminatory and anti-competitive practices, and that this condition will worsen in the future. To support its finding, the Commission relied upon unsubstantiated allegations of discriminatory conduct in public comments, its own experience in reviewing applications and complaints, and its own understanding of the incentives for monopolists to behave discriminatorily.

Puget and Dalton additionally assert that FPA § 206(a) requires that the requisite findings of undue discrimination be made in the context of a hearing. Although they concede that a rulemaking proceeding can satisfy the statute's hearing requirement, Puget and Dalton maintain that the rulemaking proceeding nevertheless must clearly identify the challenged activities and actors, and give the accused actors the opportunity to demonstrate that their activities were not unlawful. The petitioners protest that the Commission's notice-andcomment rulemaking process did not afford them such opportunity.

***11** FERC claims the discretion under NLRB v. Bell Aerospace Co., 416 U.S. 267, 293, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), to choose between rulemaking and case-by-case adjudication; and FERC contends that its generic rulemaking process fully satisfied the requirements of FPA § 206(a). FERC concedes that it relied upon general findings of systemic monopoly conditions and the resulting potential for anti-competitive behavior, rather than evidence of monopoly and undue discrimination on the part of individual utilities. Citing our opinion in Wisconsin Gas Co. v. FERC, 770 F.2d 1144, 1166 (D.C.Cir.1985), however, FERC maintains that such findings are sufficient to substantiate its decision to impose the open access requirement. Finally, FERC observes that we rejected these same arguments in AGD. See 824 F.2d at 1008 (citing Wisconsin Gas, 770 F.2d at 1165-68).

Again, we must agree with the Commission. In American Public Gas Ass'n v. FPC, we held that the Commission could exercise its authority under NGA § 5(a), the provision parallel to FPA § 206, through rulemaking as well as adjudication. See 567 F.2d 1016, 1064-67 (D.C.Cir.1977); see also Wisconsin Gas, 770 F.2d at 1153 (articulating the American Public Gas holding). Congress subsequently ratified the American Public Gas holding when it enacted the Department of Energy Organization Act, 42 U.S.C. § 7173(c) (1994). See Wisconsin Gas, 770 F.2d at 1153 n. 8 (acknowledging the Act). That statute provides that "the establishment of rates and charges under the Federal Power Act [16 U.S.C. 791a et seq.] or the Natural Gas Act [15 U.S.C. 717 et seq.], may be conducted by rulemaking procedures." 42 U.S.C. § 7173(c) (brackets in original). By passing a statute adopting the holding of American Public Gas, and explicitly applying that rule to the FPA as well as the NGA, Congress signaled its intent that the hearing requirements of NGA § 5(a) and FPA § 206(a) be interpreted similarly.

Interpreting the hearing requirement of NGA § 5(a), we have said that, while the Commission cannot rely solely on "unsupported or abstract allegations," the agency is also not required to make "specific findings," so long as the agency's factual determinations are reasonable. See Wisconsin Gas, 770 F.2d at 1158. In AGD, we applied Wisconsin Gas in holding that the Commission was not required to make specific findings that individual rates charged by individual pipelines were unlawful, or to offer empirical proof for all the propositions upon which its order depended, before promulgating a generic rule to eliminate undue discrimination. See AGD, 824 F.2d at 1008-09. Upon comparison of the order considered in AGD with Order 888, if anything, FERC more thoroughly documented the reasons for its actions in Order 888 than in the earlier natural gas order.

Puget claims that AGD and Wisconsin Gas are distinguishable, and that this case is governed by Electricity Consumers Resource Council v. FERC, 747 F.2d 1511 (D.C.Cir.1984), in which we reversed FERC's adoption of a rate based on an economic theory in the absence of a discussion of the practical applications of that theory. See 747 F.2d at 1514. As the AGD court recognized, however, the court in Electricity Consumers was persuaded that the Commission had distorted the economic theory it claimed to apply. See AGD, 824 F.2d at 1008. Just as the pipelines in AGD did, Puget has failed to articulate exactly how FERC has distorted the theories on which it relies in Order 888. Additionally, the AGD court rejected the idea that "Electricity Consumer's reference to 'economic theory' was intended to invalidate agency reliance on generic factual predictions merely because they are typically studied in the field called economics." Id. Following the rationale of Wisconsin Gas and AGD, we conclude that FERC has satisfied the requirements for invoking its authority under FPA § 206(a).

3. Discriminatory Effect of Order 888

***12** Dalton charges that, even if the FPA permits FERC to impose involuntary wheeling generally, the open access requirement of Order 888 causes rather than remedies discrimination, and therefore violates FPA § 206(a)'s express requirement that FERC act against undue discrimination. Specifically, Dalton and the other non-jurisdictional owners of the Georgia ITS facilities invested millions of dollars in those facilities in order to use the facilities each owns and receive reciprocal open access transmission services from the other owners. Under the Open Access Transmission Tariff (OATT), other customers do not have to make such investments to use the Georgia ITS facilities. FERC responds that Order 888 does not unduly discriminate between old and new customers of integrated transmission systems like the Georgia ITS; and that if Dalton has evidence that the tariff results in undue discrimination in its individual circumstances, Dalton remains free to file a petition under FPA § 206 for redress, and FERC will consider its claim.

FERC's conclusion that its open access requirement is not unduly discriminatory is subject only to arbitrary and capricious review. See 5 U.S.C. § 706(2)(A) (1994); Sithe/ Independence Power Partners, LP v. FERC, 165 F.3d 944, 948 (D.C.Cir.1999); Union Pacific Fuels, Inc. v. FERC, 129 F.3d 157, 161 (D.C.Cir.1997). We conclude that FERC has adequately explained why its open access requirement is not unduly discriminatory. Relying upon extensive commentary as well as its own experiences, FERC concluded that, as a general matter, transmission industry conditions were conducive to discriminatory practices and anti-competitive behavior, such that case-by-case adjudication could not adequately address the problem. FERC also recognized that its generic findings may have exceptions, and thus that Order 888 may in individual circumstances have a different result than that intended. Therefore, Order 888 does not preclude facilities owners the opportunity to argue their particular circumstances in their OATT filings or, as with Dalton, in their own petitions for relief under FPA § 206(a). Rather, Order 888 merely shifts from a regulatory norm in which a user of transmission services must demonstrate to FERC an individualized need for open access to one in which a provider of transmission services must present to FERC individualized circumstances requiring relief from open access. As the petitioners have a mechanism by which they can seek relief for their particular concerns, we find nothing arbitrary or capricious about FERC's conclusion that its approach to open access is not unduly discriminatory.

In another stab at demonstrating the discriminatory effect of Order 888's open access requirement, Dalton alerts us to an agreement entered into between it and Georgia Power Company (GPC) in partial implementation of antitrust conditions contained in operating licenses issued by the Nuclear Regulatory Commission for jointly owned nuclear facilities connected to the Georgia ITS. Those antitrust conditions require GPC to provide Dalton with transmission services until the nuclear licenses expire, long after the ITS Agreement terminates. Dalton alleges that limitations imposed by Order 888 on Dalton's rights upon termination of the ITS Agreement are inconsistent with GPC's obligations under the nuclear licenses, and that the interference will result in discrimination against Dalton. FERC maintains that it agreed in addressing GPC's Order 888 compliance filing to treat the ITS Agreements separately.

*13 Ultimately, Dalton has offered no present injury from the alleged conflict, so this issue is not ripe for review. Dalton will only be injured if, upon termination of the ITS Agreement, Order 888 interferes with Dalton's right to transmission services. Dalton's own argument suggests as much, observing that FERC "left to GPC the decision whether it 'must, but cannot, comply with separate orders' of NRC and FERC and whether it will present evidence of such conflict to either Commission," and complaining that even if GPC does act, "the orders under review provide no assurance that the competitive transmission and other service rights provided by the nuclear licenses will be respected under the OATT." Br. of Petitioner Dalton at 23 (quoting Order 888-A, ¶ 31,048 at 30,452). In short, GPC and FERC are still in the process of determining whether the antitrust provisions even conflict with Order 888, as well as how to deal with any such inconsistency. [FN5] Accordingly, this issue is not appropriate for judicial review at this time.

B. Constitutional Challenge: Fifth Amendment Takings Clause

Puget and amicus curiae Pacific Legal Foundation (Pacific) contend that Order 888 violates the Takings Clause of the Fifth Amendment. These petitioners maintain that Order 888's open access requirement engineers a "taking" in two ways: First, that FERC's open access requirement effects a regulatory taking by arbitrarily changing pricing methodology in a way that excessively deprives transmission owners of their investments in facilities; and, second, that the open access requirement allows a physical invasion, a permanent physical occupation, by taking away the transmission owners' right to exclude competitors from their transmission property. We cannot grant relief on either ground.

When the action of the federal government effects a "taking" for Fifth Amendment purposes, there is no inherent constitutional defect, provided just compensation is available. At bottom, both of the petitioners' Fifth Amendment claims turn not on whether open access effects a taking, but whether FERC's cost-based transmission pricing policies in the end provide just compensation. The remedy of just compensation is not within our jurisdiction but that of the United States Court of Federal Claims, under the Tucker Act, 28 U.S.C. § 1491. See Bell Atlantic Tel. Cos. v. Federal Communications Comm'n, 24 F.3d 1441, 1444 n. 1 (D.C.Cir.1994); Railway Labor Executives' Ass'n v. United States, 987 F.2d 806, 815-16 (D.C.Cir.1993).

We recognize that our jurisdiction to review an agency's construction of a statute necessarily involves an exercise of the policy of avoiding constitutional issues where possible, even though the issues may concern arguable takings amenable to Tucker Act remedy, "when 'there is an identifiable class of cases in which application of a statute will necessarily constitute a taking.' " Bell Atlantic, 24 F.3d at 1445 (D.C.Cir.1994) (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 n. 5, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985)). We need not decide whether this case falls within that category, however, because even if it did, any takings problem created by Order 888 does not raise such significant constitutional doubt as to require us to construe the FPA to prohibit FERC from ordering open access. If there is a taking, and a claim for just compensation, then that is a Tucker Act matter to be pursued in the Court of Federal Claims, and not before us.

III. FEDERAL VERSUS STATE JURISDICTION OVER TRANSMISSION SERVICES

*14 Vertically integrated utilities use their own facilities to generate, transmit, and distribute electricity to their customers. Traditionally, the customer paid one combined rate for both the power and its delivery, thus the industry refers to such sales as "bundled." To the extent that bundled sales are made directly to the end user of the electricity, they are also recognized as retail sales. Utilities may also sell the electricity they generate at wholesale to other utilities or other resellers of power, which then resell that power to their own customers. Thus, the same utility may use its facilities to serve both retail and wholesale customers. Vertically integrated utilities use their transmission facilities to move electricity over long distances, and use local distribution lines to deliver the electricity to the end user.

Even before Congress enacted the FPA, the Supreme Court held that states could not regulate wholesale sales of electricity. See Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927). A few years later in 1935, Congress included in the FPA a provision giving the Federal Power Commission, FERC's predecessor agency, the authority to regulate "the sale of [electric] energy at wholesale," as well as "the transmission of electric energy in interstate commerce." FPA § 201(a), 16 U.S.C. § 824(a) (1994). FERC also limited federal regulation "to those matters which are not subject to regulation by the States," id., and reserved to the states "jurisdiction ... over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce...." FPA § 201(b), 16 U.S.C. § 824(b). Pursuant to these provisions, FERC has regulated wholesale power sales and interstate transmissions, and state agencies have retained jurisdiction over bundled retail transactions, including service issues and the intrastate sale and distribution of electricity through local distribution facilities.

Initially, as most transactions involved either a wholesale or a retail sale, and correspondingly transmission or local distribution facilities, this regulatory division of labor was straightforward in application. Indeed, in 1935, when Congress enacted the FPA, the networks of high-voltage, long-distance transmission lines which today crisscross the United States did not exist. Instead, vertically integrated utilities individually built facilities sufficient to meet the power needs of their customers. Over time, however, the landscape of the electric industry changed.

***15** Utilities decided to cover demand spikes by sharing power, rather than by building more generation capacity. The transmission grid developed from these arrangements. Eventually, nonutility generators started producing electricity; and power marketers began to buy and resell electricity to other power marketers, utilities, or even directly to consumers. These industry participants do not own transmission lines, so they rely upon the utilities that own such facilities to provide transmission services. In addition to their traditional bundled sales activity, vertically integrated utilities started "unbundling" their own services and developing their own power marketing units to buy and sell electricity at wholesale. Some states even mandate unbundling of retail services. As a result of these changes, facilities once used solely for local distribution of bundled retail sales now engage regularly in unbundled wholesale transmissions and retail delivery as well. Thus, while the electricity world once neatly divided into spheres of retail versus wholesale sales, and local distribution versus transmission facilities, such is no longer the case.

In Order 888, FERC reinterpreted FPA § 201 to accommodate the new industry practices and conditions. FERC left the regulation of bundled retail transmissions to the states, concluding that "when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail." Order 888, ¶ 31,036 at 31,781. Nevertheless, FERC asserted jurisdiction over all unbundled retail transmissions, and left to the states only the sales portion of unbundled retail transactions, on the ground that FPA § 201 gives it jurisdiction without qualification over all transmission by public utilities in interstate commerce. See id. Also, while acknowledging that FPA § 201(b) explicitly places retail transmissions by "facilities used in local distribution" beyond the Commission's jurisdiction, FERC adopted a seven factor jurisdictional test for determining which facilities fall within that category, and claimed exclusive authority over those that do not. See id. at 31,780, 31,784. In the present litigation, each of these changes is challenged, with some petitioners claiming that FERC went too far, and others contending that the Commission did not go far enough in asserting jurisdiction.

A. Bundled Retail Sales

***16** Several state regulatory commissions complain that FERC exceeded the boundaries of its statutory authority by asserting jurisdiction over unbundled retail transmissions. These state petitioners argue that the plain meaning and history of FPA § 201(a) gives FERC the authority to regulate only transmissions of electricity consumed in a state other than that in which the electricity was generated, if the transmission was not otherwise subject to state regulation. The states historically have regulated retail transmissions as part of bundled retail sales of electricity, while FERC has regulated wholesale transmissions; and the division of regulatory jurisdiction should not change merely because those transactions have now been unbundled into separate generation, transmission, and sales components.

Two groups of transmission dependent utilities, TAPS and TDU Systems, and the nation's largest power wholesaler, Enron Power Marketing (collectively the "unbundling and discounting" or "U&D" petitioners), both intervene on the side of FERC with respect to the states' claim, and separately challenge FERC's interpretation of its jurisdiction on different grounds. The U&D petitioners contend that FERC impermissibly limited its jurisdiction by leaving the regulation of bundled retail transmissions to the states. These parties maintain that FERC has the authority to regulate both bundled and unbundled retail transmissions, and that FERC violates FPA § 206 by limiting the scope of Order 888 to the latter. To establish that bulk transmission by utilities is transmission in interstate commerce regardless of whether the power is sold at wholesale or retail, the U&D petitioners cite particularly FPC v. Florida Power & Light Co., 404 U.S. 453, 92 S.Ct. 637, 30 L.Ed.2d 600 (1972), and Jersey Central Power & Light Co. v. FPC, 319 U.S. 61, 63 S.Ct. 953, 87 L.Ed. 1258 (1943), two of the cases relied upon by FERC in the Notice of Proposed Rulemaking, ¶ 32,514 at 33,135-42. As further support that FERC's jurisdiction extends to all interstate transmissions, the U&D petitioners offer NGA precedent recognizing FERC's authority over all interstate gas transportation, if not the gas being transported. See, e.g., FPC v. Louisiana Power & Light Co., 406 U.S. 621, 636, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972); United Distribution Cos. v. FERC, 88 F.3d 1105, 1153 (D.C.Cir.1996) (UDC); Mississippi River Transmission Corp. v. FERC, 969 F.2d 1215 (D.C.Cir.1992). These petitioners contend that excluding bundled retail transmissions from the OATT will permit discrimination and give owners a competitive advantage, contrary to the mandate of FPA § 206(a) that FERC eliminate undue discrimination. Accordingly, the U&D petitioners claim that FERC erred when it declined to mandate functional unbundling for an owner's transmissions to bundled retail customers of (1) its own generated power or (2) power purchased at wholesale.

In response to these challenges, FERC maintains that the plain meaning of FPA § 201 gives the Commission jurisdiction over all interstate transmissions without qualification, while at the same time limiting jurisdiction over sales to wholesale sales. Relying particularly on Florida Power & Light and Jersey Central Power & Light, FERC asserts broad jurisdiction over all transmission activities in interstate commerce. As for bundled retail sales, FERC's position is that once the transmission service is bundled with generation and local distribution, it becomes merely a component of the retail sale itself, over which FERC has no jurisdiction. FERC maintains that natural gas jurisprudence is inapplicable because the language of the NGA and FPA differ on this issue, and the natural gas cases turned on the existence of a regulatory gap that does not exist in the electricity field. FERC also asserts that its interpretation of the FPA's jurisdictional grant is entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

*17 Both FPA § 201(a) and (b) clearly and unambiguously confer upon FERC jurisdiction over the "transmission of electric energy in interstate commerce." FPA § 201(c) further provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof." 16 U.S.C. § 824(c). In both Florida Power & Light and Jersey Central Power & Light, the Supreme Court considered whether certain indirect transmissions of electrical power across state lines represented transmissions in interstate commerce.

Jersey Central Power & Light involved the transmission of energy generated by Jersey Central in New Jersey. Jersey Central transmitted electricity to the New Jersey transmission facilities of another company, Public Service, which then transmitted the power first to another of its New Jersey facilities, and then on to a facility owned by yet a third company and located in the middle of a body of water separating New Jersey from Staten Island, New York. The third company in the chain then transmitted the energy first to its own facilities in New York, then finally and ultimately to consumers in New York. Jersey Central's own transmission facilities were located solely in New Jersey, and as were the facilities used by Public Service to receive the transmissions from Jersey Central.

The Supreme Court recognized that Jersey Central had no control over the transmissions' destination once the electricity was delivered to Public Service, see Jersey Central, 319 U.S. at 65, and that the total flow of electricity from Jersey Central to New York was small. See id. at 66. Nevertheless, because some electricity generated by Jersey Central in New Jersey was consumed in New York, the Court upheld FERC's jurisdiction under FPA § 201 over Jersey Central's transmission facilities as utilized for transmissions in interstate commerce. See id. at 67. The Court said that, under FPA § 201(a) and (b), FERC's power extends over all facilities "which transmit energy actually moving in interstate commerce." Id. at 72. The Court emphasized, however, that "mere connection" of one utility's transmission facilities to those of another transmitting in interstate commerce was insufficient for jurisdiction under FPA § 201. Id.

The Court revisited the issue in Florida Power & Light, which involved certain Florida and Georgia utilities who voluntarily connected their transmission facilities to coordinate their activities and exchange power as required to meet temporary needs. Like Jersey Central, FP&L's transmission facilities were confined to Florida, and none of FP&L's transmission lines directly connected with those of out-ofstate companies. Nevertheless, because FP&L was a member of a group of interconnected utilities, its transmission lines connected with those of other Florida utilities; and the lines of one of those other utilities, Florida Power Corp., interconnected just short of Florida's northern border with those of Georgia Power Co. Records indicated that power transfers between FP&L and Florida Power coincided with transfers between Florida Power and Georgia Power.

*18 In Jersey Central, logs of the relevant companies demonstrated at least a dozen occasions when facilities in New York drew power from certain lines at times when Jersey Central was the only supplier of electricity to those lines. See Florida Power & Light, 404 U.S. at 459. By way of contrast, there was no similar evidence that power generated by FP&L specifically passed through Florida Power to Georgia Power, with Florida Power serving as a mere conduit. See id. At best, company records demonstrated instances when transfers between FP&L and Florida Power occurred at or about the same time as transfers between Florida Power and Georgia Power. See id. at 457.

Instead, the Court considered two theories by which FP&L's power could be deemed transmitted across state lines. The first posited a cause and effect relationship by which every flick of a light switch would cause every generator on a multi-state interconnected system to produce some quantity of additional electricity to maintain the system's balance, and thus to transmit electric energy throughout the system and across state lines. The second theory suggested that where the transmission lines of two utilities interconnect, their energy commingles, such that inevitably some energy transmitted by FP&L to Florida Power was then transmitted to Georgia Power and across state lines.

Despite its statement in Jersey Central that "mere connection determines nothing," 319 U.S. at 72, the Court relied on the second of these theories to conclude that FP&L's facilities were transmitting energy in interstate commerce, and left open the possible validity of the cause and effect theory. See 404 U.S. at 462-63. Writing in dissent, Justice Douglas characterized the Court's opinion as "mean[ing] that every privately owned interconnected facility in the United States ... is within the [Federal Power Commission's] jurisdiction," such that otherwise local utilities would now be subject to the mandates of the federal bureaucracy. Id. at 471 (Douglas, J., dissenting).

The Supreme Court has interpreted the language in FPA § 201 regarding FERC's jurisdiction over transmissions in interstate commerce. We are bound by the High Court's dictates to conclude that the FPA gives FERC the authority to regulate the transmissions at issue here, whether retail or wholesale. Even if the Court had not so spoken, however, and even if we independently concluded that the statute's text was less than clear, it is the law of this circuit that the deferential standard of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), applies to an agency's interpretation of its own statutory jurisdiction. See Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1283-84 (D.C.Cir.1994). As guided by Chevron, unless Congress has directly spoken to the contrary, or FERC has unreasonably or impermissibly interpreted the statute, we must defer to the Commission's construction of ambiguous provisions of the FPA. See Chevron, 467 U.S. at 842-43. In this age of interconnected transmission grids, and given the accompanying technological complexities, we would be hard pressed to conclude that FERC's interpretation of § 201(c) as giving it jurisdiction over both wholesale and retail transmissions is unreasonable or impermissible.

***19** Nevertheless, we are not persuaded that this conclusion requires FERC to mandate unbundling and assert jurisdiction over all retail transmissions. Just as FPA § 201 gives FERC jurisdiction over transmissions in interstate commerce and sales at wholesale, the statute also clearly contemplates state jurisdiction over local distribution facilities and retail sales. The statute is much less clear about exactly where the lines between those activities are to be drawn. A regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce or as an integral component of a retail sale. Yet FERC has jurisdiction over one, while the states have jurisdiction over the other. FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction therefore represents a statutorily permissible policy choice to which we must also defer under Chevron. Accordingly, we affirm FERC's decisions in Order 888 to assert jurisdiction over unbundled retail transmissions while leaving regulation of bundled retail transmissions to the states.

B. Local Distribution Facilities

FPA § 201(b) explicitly excludes from FERC jurisdiction "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). Historically, wholesale sales have not for the most part involved local distribution facilities. FERC claims that increased unbundling gives resellers the opportunity to reconfigure the wholesale sales so that they might now occur on those facilities which traditionally have been treated as local distribution facilities. Moreover, FERC's assertion of jurisdiction over the transmission component of unbundled retail sales blurred the line between local distribution facilities and facilities used for transmission in interstate commerce.

In Order 888, FERC claimed exclusive authority over the regulation of facilities which sell and transmit electricity at wholesale to customers who will resell the electricity to end users. With respect to unbundled retail sales, FERC acknowledged that transmissions by "facilities used in local distribution" are beyond the Commission's jurisdiction, while facilities engaged in interstate transmission are subject to FERC jurisdiction under FPA § 201(a). Thus FERC adopted a seven factor jurisdictional test to identify whether a facility is a local distribution facility subject to state jurisdiction or a facility engaged in interstate transmission subject to FERC jurisdiction. [FN6] In short, under Order 888, when a public utility is engaged in wholesale transmission, FERC has jurisdiction regardless of the nature of the facility; but when the public utility is engaged in unbundled retail transmission, the facts and circumstances will determine whether the facilities are subject to FERC or state jurisdiction.

***20** The state petitioners argue that FERC's dual approach radically expands its jurisdiction and violates Congress' explicit directive in FPA § 201(b) that regulation of local distribution facilities be left to the states. The states contend that Congress clearly intended to preserve state jurisdiction over local distribution facilities, regardless of whether the energy comes from out of state or the sale is a wholesale sale. The states maintain that, by claiming jurisdiction over any facility transporting energy for resale, regardless of whether the facility might otherwise be a local distribution facility under the seven factor test, FERC has adopted the circular reasoning that wholesale sales do not occur on local distribution facilities, so any facility that engages in wholesale activities is not a local distribution facility. The states contend further that FERC offers no reasoned analysis of why local distribution should be defined differently for wholesale versus retail sales. The states finally charge that, under Order 888, nearly identical facilities would be under federal jurisdiction and state jurisdiction for different customers receiving indistinguishable service. Such a situation, they contend, will only encourage energy marketers to choose their regulator by using middlemen to shift the point at which title to the power transfers, and thus undermine the jurisdictional certainty that Order 888 states is necessary for competition.

FERC responds that it is not asserting jurisdiction over local distribution facilities, but asserts that when a public utility delivers unbundled energy at wholesale to a supplier for the purpose of resale to an end user, FPA § 201 gives FERC unqualified authority to assert jurisdiction over the facility used to effect that transaction. When the public utility is engaged in unbundled retail transmission, however, the circumstances of a specific case will determine whether the facilities used are subject to FERC or state jurisdiction. The arguments by the states do no more than raise policy concerns which are for FERC and not the court. See Arent v. Shalala, 70 F.3d 610 (D.C.Cir.1995).

Intervening again on FERC's behalf on this issue, the U&D petitioners add that FERC's use of different tests is appropriate given the differences in the two separate jurisdictional grants of FPA § 201. The intervenors argue that, given the statute's clear grant to FERC of jurisdiction over all aspects of wholesale sales, FERC is fully justified in employing a functional test to identify wholesale transmissions. In contrast, because FERC's jurisdiction over retail sales is limited to transmissions in interstate commerce, the seven factor test is more appropriate.

*21 We agree that FERC's dual approach to assessing its jurisdiction stems from the fact that FPA § 201 contains more than one jurisdictional grant. FPA § 201(b) denies FERC jurisdiction over local distribution facilities "except as specifically provided in this subchapter and subchapter III." 16 U.S.C. § 824(b)(1) (emphasis added). FPA § 201(a) makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used. FERC's assertion of jurisdiction over all wholesale transmissions, regardless of the nature of the facility, is clearly within the scope of its statutory authority. Moreover, various cases support the proposition that FERC regulates all aspects of wholesale transactions. See, e.g., Duke Power Co. v. FPC, 401 F.2d 930, 935-36 (D.C.Cir.1968) (noting that the FPC regulates public utility facilities used in wholesale transmissions or sales in interstate commerce); Arkansas Power & Light Co. v. FPC, 368 F.2d 376, 383 (8th Cir.1966) (stating that the functional use of the transmission lines--wholesale versus retail--controls); Wisconsin-Michigan Power Co. v. FPC, 197 F.2d 472, 477 (7th Cir.1952) (finding that transmission facilities used at wholesale are not "local distribution facilities").

The seven factor test applies only to unbundled retail sales, where FERC seeks to regulate pursuant to the separate grant of jurisdictional authority over transmissions in interstate commerce. In this context, the definition of "facilities used in local distribution" becomes relevant. The statute does not define "facilities used in local distribution," but instead leaves that task to FERC. As Chevron counsels us, FERC's interpretation of undefined and ambiguous statutory terms is entitled to deference. See Chevron, 467 U.S. at 842-43.

FERC has adopted a multi-factor test to determine the nature of transmission facilities. In a footnote, Order 888 says that distribution-only facilities which sell only at retail will still be considered local distribution facilities. See Order 888, ¶ 31,036 at 31,981 n.99. This is consistent with the fact that states historically have regulated bundled retail sales to end users. However, Order 888 implicitly recognizes the current reality that many primarily retail utilities engage in both local distribution and interstate transmissions, and seeks through the seven factors to discern each facility's primary function. We cannot agree with the state petitioners that this approach is unreasonable or otherwise impermissible.

IV. RECIPROCITY

*22 Section 6 of the Tariff contains a reciprocity provision resting on the principle that any public utility offering "nondiscriminatory open access transmission for the benefit of customers should be able to obtain the same nondiscriminatory access in return." Order 888, ¶ 31,036 at 31,760. Non-public utilities--those outside the Commission's jurisdiction because, for instance, they are state-owned, see 16 U.S.C. § 824(f)--would otherwise not have to offer openaccess. Under the Tariff, a public utility does not have to offer them access unless they reciprocate. In order to avoid controversies between public and non-public utilities regarding reciprocal service, the Commission adopted a voluntary "safe harbor" provision pursuant to which non-public utilities could submit a transmission tariff to the Commission for a determination whether it satisfied the reciprocity condition. If it did, the public utility would have to offer service; if it did not, the public utility could refuse service (although it had the option of waiving the reciprocity condition, as did the Commission itself).

A. Indirect Regulation of Non-Jurisdictional Utilities

Nebraska Public Power District (NPPD), a state entity, provides electrical generation, transmission and distribution service to wholesale and retail customers throughout Nebraska. [FN7] It claims that the Commission, through the reciprocity provision, has reached beyond its statutory authority and is illegally attempting to regulate entities, including NPPD, over which the Commission has no jurisdiction, in violation of the Federal Power Act and the Tenth Amendment to the Constitution. NPPD admits that pursuant to Nebraska law, all state power districts are obligated to provide open access transmission service. They have been doing so for years. This is doubtless why, after Order No. 888 issued, another Nebraska public power district so easily obtained a safe harbor declaration. See Omaha Pub. Power Dist., 81 F.E.R.C. ¶ 61,054 (1997). In light of this, the Commission argues--and we agree--that NPPD's petition is unripe. Since NPPD already offers open access transmission, it is far from certain that the reciprocity provision will have any effect on it. [FN8] It certainly has not demonstrated any particular hardship that it would suffer if we refused to engage in preenforcement judicial review. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 386, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). From all that appears, no public utility has refused, or even threatened to refuse, to give NPPD access to its transmission system in the wake of Order No. 888. [FN9] Given the fact that public utilities may waive the reciprocity provision anyway, and that NPPD has the same option of obtaining a safe harbor as did the Omaha Public Power District, we are not persuaded that the provision is currently altering NPPD's conduct of its affairs or that withholding judicial review will cause it any hardship whatever. "Unlike the drug manufacturers in Abbott Laboratories [v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)], but like the cosmetics companies in Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967), NPPD need not change its "behavior or risk costly sanctions." Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1205 (D.C.Cir.1998). Furthermore, exactly how the Commission will fill in the contours of the reciprocity provision remains to be seen. That it may defer to state commissions, as it indicated in Houston Lighting & Power Co., 81 F.E.R.C. ¶ 61,015 (1997), order on reh'g, 83 F.E.R.C. ¶ 61,181 (1998), affects NPPD's contention that the Commission is seeking to bring about nationwide uniformity by forcing non-public utilities to comply with its "detailed mandates." NPPD Brief at 5. We therefore